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Making sense of employment law

Work status: A guide for employers

The work categories

The law distinguishes between workers, employees and the self-employed. The distinctions matter because workers and employees have certain rights, such as entitlement to the national minimum wage and paid annual leave. Employees (who would also fall within the worker definition) have additional rights, such as the right to statutory sick pay and protection from unfair dismissal (which is normally subject to having two years' service). Self-employed contractors have no such rights.

This is separate from HMRC's definition of self-employment, and an individual may be considered to be self-employed for tax purposes while the courts might find that they are in fact a worker or employee.

What is written in the contract does not determine work status and it is what is going on in practice which counts.

Minimum legal requirement

There must be "mutual obligation for a contract actually to exist, irrespective of the type of status. This basically means that each party must have an obligation to fulfil their part of the deal. Examples could be a decorator agreeing to paint a house for a fixed fee or a courier agreeing to deliver something for a fixed sum. In both cases, the parties would have an obligation to perform their side of the bargain.

Worker status

For worker status the individual must be obliged to provide work or services, personally, rather than sending another person in their place. They must also not be providing the work or services as a business.

The requirement for personal work or services was recently considered in the Deliveroo case. It was held that as the couriers had a right to find replacements there was no personal work or services and, as a result, the couriers were not deemed to be workers.

In the Uber case, the main issue was whether the drivers were in business themselves or working for Uber. The Employment Appeal Tribunal upheld the tribunal's decision that the drivers were working for Uber, and therefore entitled to the national minimum wage and paid holiday. In particular the Employment Appeal Tribunal agreed with the tribunal that a key relevant factor was the amount of control that Uber had over its drivers. Uber has now appealed to the Court of Appeal.

Employee status

To be considered an employee, again the work or service must be done by the person under contract, but there also needs to be an element of control by the employer over the employee. Control in this context could mean, for example, whether or not the individual is bound by a disciplinary policy. Other factors for determining status could be considered, too.

Reform

Criticism of working practices, particularly relating to people working in the gig economy and on zero-hours contracts, led to a review by Matthew Taylor. In his report, published in 11 July 2017, he has put forward various proposals.

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For Employment Law Advice Contact